IN THE

Supreme Court of the United States

October Term, 1943

WERNER VON CLEMM,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below.

No opinion was written in the District Court. The opinion of the Circuit Court of Appeals is found at page 876.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 30, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (U. S. C. A., Title 28, Section 347) and under the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

Statement of the Case.

A statement of the case has been given in the petition.

Specification of Errors.

The errors relied upon are set out in the Assignment of Errors, to wit: Assignments of Error numbered "12," "13"

and "15" (R. 864-7) all of which raise the question of constitutionality of Section 95A, and the orders issued thereunder.

ARGUMENT

I.

The Presidential freezing order and Section 95(a), in so far as it authorizes such order, are unconstitutional and void.

The primary question is whether Congress has delegated legislative authority, contrary to the provisions of the Constitution Article I, Section 1. "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." *Panama Refining Co. v. Ryan*, 293 U. S. 388. In that case the section of N. I. R. A. which authorized the President to prohibit the transportation of petroleum in interstate commerce, where such petroleum was produced in excess of the amounts permitted by state law, was held unconstitutional. This Court said:

> "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or, not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

It was held that a general preamble and declaration of policy declaring that an emergency existed and that Congress desired to remove obstructions to the free flow of commerce, to promote the general welfare, and to eliminate unfair competitive practices, did not lay down a limiting standard or guide for executive action. Mr. Justice Cardozo dissented

upon the ground that limiting standards could be found in this general preamble.

In *Schechter* v. *United States,* 295 U. S. 495, it was held that the section of N. I. R. A. which authorized the President to approve or to impose codes of fair competition was unconstitutional. This Court said:

> "It supplies no standards for any trade, industry or activity."

Section 95(a) (see appendix) is not the type of statute which is complete in itself and merely awaits a finding of fact to fix the time at which it becomes effective. It is not complete. It prohibits nothing. It grants authority to the President to regulate or prohibit under his own rules, regulations and licenses. His discretion is absolute. Any payment by or to a bank, by a citizen or non-citizen, may be prohibited. Licenses may be granted or withheld at will. In these circumstances it seems clear that Section 95(a) is an unconstitutional delegation of legislative authority and that no crime is committed by violation of its provisions. The constitutionality of this section, as applied to freezing orders, has not been determined, so far as counsel has been able to discover. In *Perry* v. *United States,* 294 U. S. 330, the entire section was cited to illustrate the lack of a free export gold market, but its constitutionality was not directly involved. In *Campbell* v. *Chase National Bank,* 5 Fed. Supp. 156-172 (S. D. N. Y.) affirmed 71 F. (2d) 669 (C. C. A. 2), cert. den. 293 U. S. 592, the principal question involved was a refusal to turn over gold bullion under requisition of the Secretary of the Treasury authorized by Congress. The District Court, as an incident, held that the part of the statute authorizing the President to require a report of bullion owned was valid.

In *British-American Tobacco Co.* v. *Federal Reserve Bank*, 104 F. (2d) 652, cert. den. 308 U. S. 600, the question likewise was one of the authority to requisition gold bullion. As the Court below states in its opinion in the case at bar, the constitutionality of Section 95(a) was not considered in that case.

In the Court below, we called attention to the fact that in March 1933, when Section 95(a) was amended to give the President this authority over payments of all kinds, there was also enacted Section 95(b) of Title 12 U. S. C. A., which reads as follows:

> "The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by section 95(a) of this title are hereby approved and confirmed."

Also, on May 7, 1940, the following act was adopted:

> "Executive Order number 8389 of April 10, 1940 and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed." (Section 2 of the Act of May 7, 1940, c. 185, 54 Stat. 179.)

The apparent purpose to ratify and give a legislative status to such orders, rules and regulations is wholly ineffectual. It enacts no specific rule or regulations into law. It leaves such rules and regulations still subject to future amendment, modification or change at the discretion of the Executive. In so far as it relates to past action, it effects a reversal of the constitutional process—instead of Congress enacting a law and the President approving the same, the

President enacts a law and Congress approves the same. In so far as the ratification extends to rules and regulations "hereafter" adopted, the ratification is no different from the original grant of authority. Anticipatory approval of an executive's orders, rules and regulations is merely another way of saying that the power is granted to make such orders, rules and regulations. If the making thereof be a legislative act, it makes no difference whether the statute reads that the power to make orders and rules is granted, or that all orders and rules are approved blindly in advance.

The opinion of the Court below concedes that the statute gave the Executive unlimited discretion. It suggests first, that "there is much persuasive force in the appellee's argument that the power exerted by the Executive with regard to property of foreign nationals in a time of proclaimed emergency falls within the sphere of foreign relations and is thus free from limitations imposed on delegated authority". As to this suggestion, the answer is clear. This question does not concern the conduct of foreign affairs, in which the President is authorized "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," and in connection with which he is authorized also to "receive ambassadors and other public ministers" (Const. Art. II, Sec. 2, 3). This question is one of trade and commerce, or, as the government brief below put it, measures "of economic defense". On this subject the Constitution (Art. I, Sec. 8) provides that the Congress shall have the power "to regulate commerce with foreign nationals * * * ". Moreover, the crime referred to in Section 95(a) of which appellant has been convicted, is violation of Section 95(a) or of an order issued thereunder. That statute does not purport to make it a crime to violate unknown rules or orders issued by the President in reliance upon his authority over foreign affairs.

Secondly, the Court below, referring to the above quoted Section 2 of the Act of May 7, 1940, says "we hold that this retroactive approval and confirmation of the President's order removed all question of improper delegation with regard to Order 8389 and provided an adequate standard and guide for his exercise of discretion in Order No. 8405. The latter merely extended to new subject matter, upon facts warranting the extension, a set of regulations already approved by Congress. A clearer example of that guidance required by the *Panama* and *Schechter* cases would be difficult to imagine."

On this score, it should be observed first, that the order and the regulations may be modified or revoked at the discretion of the Executive, so that no mere approval of existing regulations could lay down a standard or guide, or define a limitation for the future. Second, the Constitution provides that Congress shall make the laws subject to the approval of the President, not the reverse.

For the foregoing reasons it is urged that the application for a writ should be granted.

Respectfully submitted,

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